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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAUKMAR JOHNSON, Defendant and Appellant.	A103624 (Alameda County Super. Ct. No. C144246)

Raukmar Johnson (defendant) appeals his conviction of first degree murder of Bobby Joe Murphy, and premeditated attempted murder of Amelia ("Mimi") Collier. The jury found true allegations pursuant to Penal Code[1] sections 12022.53, subdivisions (b) (c) and (d), 12022.5, subdivision (a)(1), and 12022.7, subdivision (a). The jury also convicted defendant of two counts of possession of a firearm, possession of cocaine base for sale, and unlawful possession of ammunition. The court found true allegations of several prior convictions, including a 1989 conviction for voluntary manslaughter that was alleged as a "strike" and as a prior serious felony conviction, and sentenced defendant to a total prison term of 129 years 8 months. Defendant filed a timely notice of appeal.

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

FACTS

September 19 Shooting of Amelia Collier and Bobby Joe Murphy

On September 19, 2002, at 9:30 p.m., Amelia Collier, also known as Mimi, was standing on the corner of 30th and Magnolia in Oakland, an area where cocaine was sold, with Bobby Joe Murphy. Bobby Joe Murphy was the uncle of Randy Murphy, the father of Collier's baby. Collier, who had a prior conviction for sale, was on probation, and denied she was selling drugs that day, but Randy Murphy later testified that she was directing customers to him, a few streets away, so he could avoid the confrontations that had been occurring on 30th and Magnolia.

As Collier was lighting a cigarette, she saw defendant cross 30th Street towards her. She knew defendant from the neighborhood, and had had conversations and drinks with him in the past. She had also seen him on the same corner two days earlier, on September 17, with a handgun and a rifle.[2] She also knew defendant's girlfriend, China, and had seen him once at China's apartment near 30th and Union. Defendant was wearing a light blue sweater with a dark blue stripe. He came up to her and "[got] in her face." He smelled of alcohol. In an apparent reference to Randy Murphy, he asked, "Where your boy at now?" and punched Collier in the face. He pulled a gun, and as she turned away shot her in the back of her neck. This bullet, at the time of trial, remained lodged in her back between her lungs. She fell to the ground, and he stood over her and fired again. The bullet split her finger as she raised her hands. Collier saw defendant run after Bobby Joe, who was running away. Collier heard a shot, and heard Murphy cry out. Then defendant headed back towards her, and walked in the direction of China's house. Bobby Joe Murphy died of his wounds.

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[2] Defendant was charged with three counts of being a felon in possession of a firearm: The first was on September 17, based upon the above-referenced testimony. The second was on September 19, based upon the evidence that defendant shot Collier and Bobby Joe Murphy. The third was on September 26, when the police searched defendant's residence and found a gun and ammunition. The jury acquitted defendant of the September 17 count.

Larry McBride, a friend of Bobby Joe Murphy, had been dropped off by friends on 30th Street. He saw Collier and Bobby Joe Murphy on the corner talking to a man dressed in white and wearing a black doo-rag or skull cap. McBride was getting some water from a hydrant when he heard shots. He turned and saw Collier fall. The man stood pointing the gun at her. As Collier screamed, McBride heard two more shots, and saw Bobby Joe Murphy running away. The man with the gun followed Bobby Joe Murphy, and McBride heard more shots. McBride ran to Murphy, and the gunman started backing away. McBride could not see the gunman's face, and could not identify defendant as the gunman.

Lorry Alesna was in the kitchen of her apartment when she heard gunshots. She looked out and saw a man, wearing a white or light blue jogging suit with a darker stripe, running across the street. He put a gun in his pants and put his shirt over it. She lost sight of him as he ran toward Union and 30th. Alesna ran outside, and found Collier on the sidewalk. Collier said, "Rock shot me." Alesna did not know who "Rock" was. She did not know defendant from the neighborhood, and could not identify him as the man she saw running away.

When Officer Midyett arrived at the scene at about 10:00 p.m., Collier told Midyett that "Rock" shot her. The police later learned that "Rock" was defendant's nickname. Some bystanders said that a green Camaro had just left the scene, going west, and Belinda Carpenter said that one of Rock's friend's had a green Camaro. Midyett broadcast this information on the radio. At the hospital Collier repeated to Midyett that "Rock" was the person who shot her.

Officer Baker heard the broadcast, and stopped a green Camaro that was being driven at about 35 miles per hour on 28th Street. John Williams, the driver, was wearing a green shirt and jeans. Sylvester Lyons, the passenger, wore a gray shirt and jeans. He smelled of alcohol and vomited. Williams said they were coming from the funeral of a friend who died the previous week. The car smelled of hot brakes, as if it had been driven hard and fast. Samples were taken of the hands of both men for gunshot residue tests, but there was no evidence that the tests were ever done.

Williams testified that he, Lyons, defendant, and others had been at a post-funeral gathering for Johnnie Roane, Williams's cousin. Defendant was angry about Roane's death, and said whoever was responsible was going to pay. He specifically mentioned Randy Murphy. Williams tried to convince defendant that they did not know who killed Johnnie Roane, and to take care of his kids, but defendant was drunk, and Williams could not get through to him. Williams offered Lyons a ride home, because Lyons was drunk. Defendant left, with China, in Lyons's van at the same time Williams and Lyons left. Williams and Lyons stopped at a store, and were on their way to get something to eat when the police pulled Williams over, saying his car had been involved in a shooting. Williams told the police that he was supposed to be following defendant, but Williams stopped at a gas station and lost track of defendant. Williams was taken to the police department for questioning.

Officer Ferguson, who interviewed Williams, testified that Williams said he left the funeral gathering and was following defendant and China, but China was driving fast, and Williams did not keep up with her. Williams went to 30th and Union, where China lived, which was one block from 30th and Magnolia, to meet Rock, but when Williams arrived he did not see defendant. The police pulled Williams over five minutes after he left 30th and Union. Ferguson released Williams.

September 26 Search of Defendant's Residence

On September 26, the police went to serve search and arrest warrants for defendant at his residence. They took defendant into custody without incident. In a dresser in the rear bedroom the police found rock cocaine, in four bags. They found no evidence of personal use, and an expert gave his opinion that it was possessed for sale. In a nightstand, they found a box containing 27 rounds of .32 caliber bullets and a .40 caliber semiautomatic pistol in a closet.

ANALYSIS

I.

Failure to Instruct on Voluntary Manslaughter

Defendant first contends that the court had a sua sponte duty to give an instruction on voluntary manslaughter, as a lesser included offense of the murder charge. He asserts that the following constitutes substantial evidence of provocation to support such an instruction based upon an unlawful killing "upon a sudden quarrel or heat of passion." (§ 192, subd. (a)): Defendant had just attended a post-funeral gathering for his friend Johnnie Roane, where he became intoxicated and upset about Roane's death and agitated by discussions that someone should pay. Defendant believed that Randy Murphy, Collier's boyfriend, was responsible for Roane's death, and Collier had told defendant that Randy was going to kill defendant.

This evidence did not support an instruction on voluntary manslaughter because the provocation that incites the defendant to kill unlawfully in the heat of passion must be caused *by the victim*, or be conduct the defendant reasonably believed to have been engaged in by the victim. (See, e.g., *People v. Steele* (2002) 27 Cal. 4th 1230, 1253.) The "heat of passion requirement for manslaughter has both an objective and a subjective component." (*Id.* at p. 1252.) The defendant must actually, subjectively kill under the heat of passion, *and* that passion must by provoked by conduct of the victim that "would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) None of the evidence defendant cites would satisfy the objective component of adequate provocation *by the victim*, or even that it could be reasonably believed by the defendant to be attributable to the victim. In *People v. Brooks* (1986) 185 Cal. App.3d 687, the court held that the very recent killing of a close relative may constitute adequate provocation, but in that case there was evidence that the defendant reasonably believed that *the victim* had just killed the defendant's brother. By contrast, here there was no evidence that the either of the victims were responsible for Roane's death, or even that defendant reasonably believed them to be responsible. To the contrary, all of the evidence indicated defendant believed

that Randy Murphy, not the victims, was responsible for the death of Roane, and that Randy Murphy, not the victims, had also threatened to kill defendant. The mere fact that defendant may have learned of Randy Murphy's threat from Collier does not make Murphy's conduct actually or reasonably attributable to her, and defendant does not even argue any factual basis for defendant to have attributed Randy Murphy's conduct to the murder victim, Bobby Joe. The victims' only connection to the evidence of these arguably provocative acts was that they were related to Randy Murphy; Bobby Joe by blood, and Collier as the mother of Murphy's child. In the absence of substantial evidence of adequate provocation by the victims, the court did not err by failing to instruct on voluntary manslaughter based upon a killing in the heat of passion.

In any event, any error was invited by defendant, who, for tactical reasons, asked the court not to give instructions on voluntary manslaughter, and the court, upon being informed of this decision, acquiesced in it.[3] (*People v. Barton* (1995) 12 Cal.4th 186, 198; *People v. Hardy* (1992) 2 Cal.4th 86, 184.) The court has a sua sponte duty to instruct on a lesser included offense supported by substantial evidence " 'even when as a matter of trial tactic a defendant not only fails to request the instruction, but expressly objects to it being given.' " (*People v. Barton, supra,* at p. 195.) Nevertheless a "defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence." (*Id.* at p. 198.) The record unequivocally establishes that defense counsel informed the court that he and defendant had agreed not to seek instruction on voluntary manslaughter, and the court acquiesced in that strategy by not giving it. Defendant is therefore barred, by the doctrine of invited error, from raising the claim of error on appeal. (*Ibid.*)

[3] During a discussion of instructions on the murder and attempted murder counts, the court asked whether defendant sought any instructions on lesser included offenses. Defense counsel stated that he had "considered voluntary manslaughter," but that defendant did not want the instruction, and defense counsel agreed with that decision.

II.

Impeachment of Collier with Evidence of Bribe

During cross-examination of Collier, defense counsel introduced evidence that Collier had been prepared to accept a bribe in exchange for not coming to court to testify against defendant, or for changing her testimony. Collier testified that Randy Murphy, who was in jail, told her that he and defendant, who was also in jail, had made a deal: If she did not come to court to testify, or changed her testimony, she would get money, and a car or drugs, from defendant's girlfriend, China. Although Collier was willing to change her testimony in exchange for money and a car, she did not do so, because China never came up with the money, car or drugs.

Defendant contends that it was ineffective assistance of counsel to introduce this line of impeachment, because it opened the door for the prosecutor to introduce more damaging evidence against defendant. Specifically, as a direct result of this line of impeachment, the prosecutor was permitted to introduce Collier's statement, identifying defendant as the shooter, in an interview with the police in the hospital. Also, over defendant's objection that the prosecutor had not disclosed Randy Murphy as a potential witness, the court allowed the prosecutor to call Randy Murphy. Murphy testified that defendant initiated the effort to bribe Collier, and the prosecutor used that testimony to obtain an instruction that efforts to suppress evidence can evince a consciousness of guilt; and to argue the bribe effort showed defendant's consciousness of guilt. Defendant asserts that, in light of these negative consequences of pursuing this line of impeachment, the decision to pursue it fell outside the "wide range of professionally competent assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 690.)

In assessing whether counsel's decision fell outside the reasonable range of competence, the defendant must overcome "a strong presumption that, . . . under the circumstances, the challenged action 'might be considered sound trial strategy.' "

The court replied that it would therefore instruct only on first degree murder, but at the suggestion of the prosecutor stated that it would also instruct on second degree murder.

(*Strickland v. Washington, supra,* 466 U.S. at p. 689.) Judicial scrutiny of counsel's performance must be highly deferential, and made without the "distorting effects of hindsight." (*Id*.) It is also well established that, " '[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.)

Defendant argues that counsel's decision to pursue this line of impeachment was so obviously more harmful than helpful to defendant that it falls within the rare category of an act or omission for which there could be no satisfactory explanation. To the contrary, despite its potential downside, impeachment of Collier was critical to the defense, because Collier knew defendant, had consistently identified him as the shooter, and had no apparent motive to falsely accuse him. Consequently, the defense depended upon persuading the jury that Collier was not merely mistaken when she said defendant shot her, but rather that she was *lying*.[4] Evidence of her willingness to accept a bribe not to testify against defendant, or to change her testimony, was not cumulative of other impeachment available to defense counsel, because it uniquely demonstrated not only that she was capable of lying about some collateral subjects,[5] *but also a willingness to give false testimony on the subject of defendant's guilt*. Nor was the downside to pursuit of this line of impeachment as unequivocally disadvantageous as defendant suggests. It

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[4] As discussed more fully, *infra*, the other line of defense was to suggest that Williams, not defendant, was the shooter. In support of this defense theory, defense counsel impeached Collier's trial testimony, that she did not see a green Camaro at the scene of the shooting, with her preliminary hearing testimony, that before she saw defendant come down the street she had seen Williams's green Camaro at 30th and Union, and presented other witnesses who saw Williams's green Camaro at the scene.

[5] For example, defense counsel also impeached Collier with evidence that she had attempted to bail Randy Murphy out of jail, by taking advantage of an administrative error assigning him the wrong name. When she was caught doing this, she lied to the officer about how long she had known Murphy, and was arrested for a probation violation based on this conduct.

did open the door to introduction of Collier's prior consistent statement to police in the hospital, identifying defendant as the shooter, but this was not particularly damaging because other prosecution witnesses, such as Lorry Alesna, testified that immediately after the shooting, Collier identified defendant as the person who shot her. The fact that this line of impeachment led to the prosecutor calling Randy Murphy as a witness was also not as damaging as defendant suggests, because Murphy's testimony also provided some aid to the defense by contradicting Collier's testimony that she was not selling drugs the night of the shooting, and testifying that he had never seen defendant with a gun.

On balance, despite the risks, a reasonably competent counsel could conclude, based upon the overwhelming importance of persuading the jury that Collier's identification of defendant as the shooter must be discredited as a conscious lie, that the benefits of presenting evidence of her willingness to accept a bribe in exchange for changing her testimony outweighed the risk that defendant would be implicated in the bribe attempt. We therefore cannot conclude that counsel had no legitimate tactical reasons for his decision. (*People v. Holt* (1997) 15 Cal.4th 619, 704.)

III.

Instruction on Flight

The court, over a defense objection, gave CALJIC 2.52, as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." This instruction is given "where there is substantial evidence of flight by the defendant," and, where identity is in issue, that the person who fled was the defendant. (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1476; *People v. Mason* (1991) 52 Cal.3d 909, 943.)

Defendant first contends that this instruction is an improperly argumentative pinpoint instruction because it directs the jury's attention to specific evidence and implies

the conclusion to be drawn from it, or invites the jury to draw inferences favorable only to one party. (See *People v. Carter* (2003) 30 Cal. 4th 1166, 1225; *People v. Harris* (1989) 47 Cal.3d 1047, 1098.) In *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181, our state Supreme Court rejected the "argument that the flight instruction is an improper pinpoint instruction. The instruction informs the jury that it may consider flight in connection with all other proven facts, giving the fact of flight the weight the jury deems appropriate. (*People v. Kelly* [(1992)] 1 Cal.4th [495,] 531.) The instruction is not argumentative; it does not impermissibly direct the jury to make only one inference." In light of the binding authority of our Supreme Court upholding this flight instruction against an identical challenge, defendant's reliance upon the authority of other states and federal cases criticizing similar instructions is unavailing. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It was appropriate to give the instruction in this case because Collier's testimony constituted substantial evidence "identifying the person who fled as the defendant," in addition to identifying defendant as the shooter. (*People v. Mason*, *supra*, 52 Cal. 3d at p. 943.)

Nor is there any merit to defendant's suggestion that the court should have modified the instruction to inform the jury that it did not apply unless the jury found that it was defendant who fled the scene, or that defense counsel should have offered such a modification and rendered ineffective assistance by not doing so. In the absence of a request, the court has no duty to modify an instruction that accurately states the law. (*People v. Henderson* (2003) 110 Cal.App.4th 737, 742; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711 [defendant may not contend on appeal that an instruction "correct in law and responsive to the evidence was too general or incomplete" unless he offered appropriate "amplifying, clarifying, or limiting language"]; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1439 [no sua sponte duty to modify flight instruction]; *People v. Prysock* (1982) 127 Cal.App.3d 972, 1002-1003 [same].) The legal issue addressed by the modification defendant now proposes was already conveyed by the instructions given. The terms of the flight instruction itself permit an inference of consciousness of guilt, based upon the fact of a person's flight, only "if proved." The

jury was further instructed, pursuant to CALJIC No. 2.01, that ". . . before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt," and "[w]hether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist." The only reasonable and common sense meaning of these instructions is that the jury could draw on inference of consciousness of guilt with respect to defendant *only if it found the underlying preliminary fact that defendant was at the scene of the shooting and fled.* It therefore was not ineffective assistance to fail to request modification of the instructions to make the same point.

IV.

Failure to Give Instruction on Third-Party Culpability

Defendant next contends the court erred by failing to give the jury an instruction relating the evidence of third-party culpability to the allocation of the burden of proof. The third-party culpability evidence generally consisted of testimony that John Williams's car, a green Camaro, was at the scene of the shooting, and other evidence that Williams had the opportunity, and an even stronger motive than defendant, to shoot the victims.[6] Defendant argues that, without further clarification, the jury could construe CALJIC 2.90 to mean that defendant must prove third-party culpability beyond a reasonable doubt, instead of requiring the prosecutor to prove beyond a reasonable doubt that defendant was the shooter. Therefore, he asserts that the court had a sua sponte duty to fashion a third-party culpability instruction that would have informed the jury that the defendant need not prove beyond a reasonable doubt that a third party was culpable, and

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[6] For the purpose of our analysis, we shall assume, arguendo, that defendant presented sufficient evidence of third-party culpability linking a particular third person to actual perpetration of the crime. (See *People v. Hall* (1986) 41 Cal.3d 826, 833.) "Evidence of mere motive or opportunity to commit the crime by another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.)

that he was entitled to acquittal if the third-party culpability evidence raised a reasonable doubt as to his guilt.

The court did not have a sua sponte duty to give such an instruction. "Section 1096a of the Penal Code declares that when the statutory definition of reasonable doubt is given (see Pen. Code, § 1096), no other instruction need be given defining reasonable doubt. Despite this section, a defendant, *upon proper request therefor*, has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered." (*People v. Sears* (1970) 2 Cal.3d 180, 190 [italics added]; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) An instruction on third-party culpability, explaining the relationship between such evidence and the prosecution's burden to prove guilt beyond a reasonable doubt, is a pinpoint instruction that need be given only upon request. (See *People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Kegler, supra,* 197 Cal.App.3d at p. 80.)

Nor was it ineffective assistance of counsel to fail to request such an instruction, because the point was adequately conveyed by the instruction given, and it is not reasonably probable that the result would have been different if an instruction had been given on third-party culpability evidence. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) In addition to the standard instruction on burden of proof beyond a reasonable doubt (CALJIC No. 2.90), the court gave CALJIC 2.91, which specifically informed the jury that "[t]he burden is on the People to prove beyond a reasonable doubt that *the defendant is the person who committed the crime*" and that "[i]f, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime," the defendant must be found not guilty. The court also instructed the jury on the factors to consider in proving identity by eyewitness testimony (CALJIC No. 2.92). Thus, despite the absence of specific reference to evidence of third-party culpability, read as whole, we find no reasonable likelihood that the jury would have mistakenly believed that *defendant* had the burden to prove beyond a reasonable doubt that Williams was the shooter. (See *People v. Kegler, supra,* 197 Cal.App.3d at pp. 80-81.) Moreover, despite the defense argument

based, in part, on evidence of Williams's culpability, that the prosecution had failed to prove beyond a reasonable doubt defendant was the person who shot Collier and Bobby Joe Murphy, the jury found the prosecution had met its burden to prove defendant's guilt beyond a reasonable doubt, and convicted defendant. It therefore is not reasonably probable that the jury would have reached a different conclusion, had it been given a third-party culpability instruction. (See *People v. Earp, supra,* 20 Cal.4th at p. 887 [court found refusal to give requested instruction on third-party culpability harmless because the jury was properly instructed under CALJIC 2.90 that the prosecution had to prove defendant's guilt beyond a reasonable doubt, and from defense argument the jury knew the defense theory that someone other than defendant had committed the crimes].)

V.

Denial of Motion to Sever

Defendant next contends that the court should have granted a pretrial motion to sever the counts alleging the September 19 murder, attempted murder, and gun possession from the remaining counts, consisting of Collier's observation of defendant in possession of a gun on September 17, and the counts alleging drug possession and possession of firearms and ammunition on September 26, arising out of the search of defendant's residence.

Defendant first suggests that the statutory requirements for joinder were not met because the murder and attempted murder charges are not of the "same class" as the gun and drug possession counts, and the offenses he sought to sever occurred on different dates than the murder and attempted murder counts. (§ 954.) Joinder was proper, however, because on each date he was charged with being a felon in possession of a firearm, which are offenses are of the "same class," and the fact that the felon in possession charge alleged to have occurred on September 19 was "connected together in [its] commission" with murder and attempted murder, which are offenses of a different class, did not preclude joinder. (Pen Code, § 954; *People v. Koontz* (2002) 27 Cal. 4th 1041, 1074, 1075 [joinder of petty theft with robbery, vehicle taking and murder counts

that occurred on another date was proper, because theft offense shared the common characteristic of wrongful taking, and therefore were of the "same class"].)

Nor did the court abuse its discretion by denying the motion to sever based upon defendant's showing of prejudice at the time the motion was made.[7] (See *People v. Marshall* (1997) 15 Cal.4th 1, 27.) Although cross-admissibility is not essential to permit joinder (§ 954.1), it can dispel any inference of prejudice. The trial court correctly observed that there would be, at least, cross-admissibility between the September 17 firearm possession and the September 19 offenses, because the fact that Collier had seen defendant go into his house two days earlier and retrieve a gun would be admissible and relevant to the reliability of her identification of defendant as the person who shot her on September 19. The court also reasonably concluded that some evidence of the September 19 charges would be cross-admissible with respect to the September 26 offense because the drugs, ammunition and firearm were found in the execution of a search warrant obtained in the investigation of the September 19 offenses, which would explain why the officers were searching the residence. Defendant's assertion that reference to the reason the officers were present might ultimately be subject to a motion to exclude under Evidence Code section 352 did not preclude the court from finding cross-admissibility in the first instance, or concluding that its probative value would outweigh any prejudice.

Defendant did not even argue prejudice based upon any of the other relevant factors, i.e., "[whether] some of the charges [are] unusually likely to inflame the jury against the defendant" or "[whether] a weak case [has] been joined with a strong case or

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[7] We must consider only the record and arguments made at the time of its ruling. (*People v. Price* (1991) 1 Cal.4th 324, 388.) At the time the motion was made, defendant generally argued that the offenses occurring on the 17th and the 26th had no connection with the September 19th offenses, but did not contend that joinder was statutorily improper, or that joinder would result in prejudice, based upon the factual assertion that the weapons possessed on the 17th and 19th were not the same as the murder weapon used on the 26th. We therefore do not consider those arguments. Nor do we consider the Attorney General's argument regarding cross-admissibility based upon evidence presented at trial, which was not before the court when it ruled on the motion to sever.

another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses," and none of the charges was a capital offense. (*People v. Marshall, supra*, 15 Cal.4th 1, pp. 27-28.)[8] In the absence of a showing of prejudice, the strong public policy in favor of joinder prevails, and the court was within its discretion to deny the motion. (See *People v. Gomez* (1994) 24 Cal.App.4th 22, 29.)

Defendant also fails to show that a joint trial actually resulted in gross unfairness amounting to a denial of due process, requiring reversal of his convictions. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92.) He argues that the joint trial of the September 17 and 26 possession of firearms, ammunition and drugs resulted in actual prejudice with respect to the September 19 murder and attempted murder charge because the prosecutor used these other offenses to argue that defendant was a dangerous man, with access to many guns, which defendant contends caused the jury to convict him of murder and attempted murder based upon the spillover effect of his bad character rather than proof beyond a reasonable doubt that he was the shooter. The argument defendant cites, read in context, was not an invitation to infer his guilt of murder and attempted murder based upon gun and drug possession charges. Rather, it was simply part of the litany of the offenses for which the prosecutor, in his summation, asked for convictions, in addition to murder and attempted murder. Even if such an argument had been made, it would have been harmless in light of the strong direct evidence linking defendant to the murder and attempted murder.[9] The best indication that

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[8] In any event, an attempt to show prejudice on these grounds would have been unavailing: Although the murder and attempted murder were more serious offenses than the drug and firearms possession counts, they were not so unusually "brutal, repulsive, or sensational" that the jury was likely to be so inflamed as to lose its ability to base its verdict on separate consideration of the evidence as to each count. (*People v. Balderas* (1985) 41 Cal.3d 144, 174; see also *People v. Poggi* (1988) 45 Cal.3d 306, 322; see also *People v. Gomez*, *supra*, 24 Cal.App.4th at p. 29 [felon in possession of firearm is not unusually inflammatory].) The evidence of the gun, ammunition, and drug possession charges defendant sought to sever was not significantly weaker or stronger than the evidence of the September 19 charges.

[9] In addition to Collier's strong and consistent identification of defendant as the shooter, McBride and Alesna, despite their inability to identify defendant, corroborated

the jury was not affected by any possible spillover effect of joinder of the other charges is that, despite the joint trial, the jury *acquitted* defendant on the gun possession charge alleged to have occurred on September 17, demonstrating that the jury viewed and evaluated the evidence on each charge separately. (See *People v. Koontz*, *supra*, 27 Cal.4th at p. 1075.) Moreover, during deliberations, the jury asked for read backs of, among other things, Collier's testimony, the tape of a 911 call reporting the shooting and relating Collier's statement that "Rock" shot her, Alesna's testimony and Williams's testimony, all of which indicates that the jury carefully considered the evidence, and based its verdict on the murder and attempted murder charges based upon the evidence relevant to that offense, not upon improper inferences of guilt based on the gun and drug possession charges committed on other dates.

VI.

Denial of Motion to Dismiss Allegations of Prior Convictions

Prior to trial, defendant made a valid waiver of the right to jury trial on an alleged prior conviction of possession for sale, and admitted that conviction. Trial of the other alleged prior convictions, one for manslaughter, and another drug possession count was bifurcated, but at defense counsel's request, the court agreed that the decision whether to waive a jury trial on the remaining prior convictions could wait until the jury reached a verdict on the current offenses. On May 28, 2003, at approximately 4:00 p.m., upon learning that the jury had reached a verdict, the court raised the issue again, and gave defense counsel an opportunity to confer with defendant. After the court reminded defendant that he had a right to a jury trial on the prior conviction allegations, defendant personally stated that he wanted a court trial. The jury returned its verdict, and was dismissed. The prosecutor informed the court that he did not have all the necessary documents, and could not proceed until the afternoon of the next day. Defendant asked

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her description of the clothing worn by the shooter. Moreover, despite defense counsel's best efforts to impeach Collier, he could not explain why she would she would falsely identify defendant.

to delay trial until May 30, so that he could call his family and inform them of the verdict. He also asked whether, if he admitted the priors, the court could sentence him more quickly. It finally was decided to set the trial on the priors for May 30.

Before the court trial began, defense counsel moved to dismiss the prior convictions. The motion was based upon the contention that the prosecutor induced defendant to waive his right to a jury trial, by failing to disclose before the waiver was made that the prosecutor was not prepared to proceed until the next afternoon. Defense counsel, who had been trying throughout the trial to persuade the prosecutor to dismiss the prior conviction allegations, asserted that had he known that the prosecutor was not ready, he would have persuaded defendant not to waive jury trial, in the hope that the pressure of having to return the next day for a jury trial would finally influence the court to dismiss the allegations.

Defendant contends that the court should have set aside his waiver of a jury trial on the ground that it was not voluntary, knowing and intelligent, and should have dismissed the prior conviction allegations because the jury had already been dismissed. The waiver of a jury trial must be knowing and intelligent, meaning that the defendant must be informed of the nature of the right being abandoned and the consequences of the decision to abandon it. (*People v. Collins* (2001) 26 Cal.4th 297, 305.) It must also be voluntary, meaning that it is the product of free and deliberate choice not induced by coercion or deception. (*Id.*) Defendant does not contend that he was unaware of the nature of a jury trial or the consequence of waiving that right, or that he did not personally and expressly waive it. Instead, his theory appears to be that the waiver was not knowing, intelligent or voluntary because the prosecutor had engaged in deception[10] by failing to disclose a material fact, i.e., that he was not ready to proceed to trial on the priors, which, had it been disclosed, would have materially affected counsel's advice and

[10] The prosecutor denied that he withheld the information that he was not ready to proceed for the purpose of inducing defendant to waive jury trial. He explained that whether it was a jury or court trial, he simply assumed trial would not start until the next day, and he would be able to obtain the necessary documents by the afternoon.

changed defendant's decision to waive jury trial. Yet, the materiality of the prosecutor's nondisclosure was belied by defense counsel's own declaration. He declared that, *even without knowing that the prosecutor was not ready to proceed*, he had advised defendant *not to waive jury trial*, and defendant *rejected that advice*, because he "wanted the whole thing over as soon as possible." The court, in denying the motion to set aside the waiver, also observed that if, as the record suggested, a speedy resolution was defendant's primary reason for waiving a jury trial, the prosecutor's lack of preparedness also was not a material undisclosed fact, because the prosecutor stated he could be ready by the afternoon of the next day, May 29, and defendant himself asked the court to put the trial over to May 30 to allow him to contact his family and inform them of the verdict. The court therefore correctly concluded defendant failed to establish that in the absence of the alleged deception, defendant's decision to waive jury trial would have been different. Thus, the failure to disclose did not render the waiver involuntary, or not knowing and intelligent, and the court did not err in proceeding with the court trial on the prior conviction allegations.

CONCLUSION

The judgment is affirmed.

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STEIN, J.

We concur:

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MARCHIANO, P.J.

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MARGULIES, J.